U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TIM G. BAYSINGER and U.S. POSTAL SERVICE,
POST OFFICE, Woodland Park, CO

Docket No. 03-825; Submitted on the Record;
Issued August 14, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant was an employee of the United States under 5 U.S.C. § 8101(1)(A) of the Federal Employees' Compensation Act.

On June 20, 2000 appellant then a 50-year-old custodian, filed an occupational disease claim alleging that he had tissue damage in his wrists and that repeated lifting caused his bones to erode. The employing establishment controverted the claim and indicated that appellant was an independent contractor.[1]

The employing establishment provided a copy of a cleaning agreement contract dated February 15, 2000 that provided appellant was to perform 18 hours of cleaning per week at the rate of $9.00 per hour. The contract specified that the supplier, by signing the form, agreed that he was not a postal employee or member of the immediate family of a postal employee; and that he was performing the service as an independent contractor and not an employee of the employing establishment for any purpose. It was provided that the terms of the contract would not be construed to create any relationship between the parties other than an independent contractor status. The contract also added that reasonable quantities of cleaning equipment and supplies would be provided and that appellant would hold the employing establishment harmless from all claims, losses, damages, actions or causes of actions resulting from the negligent acts or omissions of the supplier.

The employing establishment indicated that appellant was free to perform the custodial services on a schedule that he established as long as the employing establishment was open and

[1] The employing establishment noted that the janitorial services contract was terminated on October 10, 2000. The employing establishment also indicated that appellant was involved in a motor vehicle accident on December 26, 1999. The record contains pages two and three of a four-page report, from an unknown physician indicating appellant's condition was the result of a motor vehicle accident of December 26, 1999.

he was free to hire helpers. It also indicated that appellant had a carpet cleaning business, that he was "sporadic" in his cleaning.

In a July 16, 2001 statement, appellant indicated that he was employed at the Woodland Park Post Office as a custodian where he swept, mopped floors and emptied the trash. He stated that he had a work release on file with the employing establishment verifying the limitations of lifting and exertion that he was allowed. Appellant stated that there was a move to a new postal location in September 2000, and Mr. Madrid, his supervisor, had him moving mail, holding shelving, MBU's and key boxes. Appellant alleged that moving these items was beyond his capabilities and he exacerbated the injuries to his wrists as a result of this work. Appellant alleged that he was terminated because the human resources department thought he was a liability. Appellant indicated that since this incident he was having severe trouble with his wrists and was only able to use them for limited periods of time without wrist supports.

In an August 2, 2001 report, Dr. Deborah J. Riekeman, a chiropractor, indicated that she was treating appellant for injuries sustained in an automobile accident on December 26, 1999. Dr. Riekeman stated that appellant's right wrist was injured at that time and that he exacerbated his wrist condition following several weeks of work at the employing establishment during the last two weeks of September and the first week of October 2000. She explained that lifting heavy boxes was too irritating to already inflamed joints and tendons in the wrist and appellant's wrist continued to bother him and it was partly related to the accident and partly related to working at the employing establishment.

By decision dated September 7, 2001, the Office found that appellant was not a civil employee of the United States and not eligible for federal compensation benefits under the Act.

In a September 21, 2001 request for reconsideration, appellant stated that he filled out a W-4 form, had a set hourly wage, clocked in and out on a time clock, used the employing establishment tools, worked on their time, worked in their facilities and was not contract labor.

In a November 21, 2001 letter, Bill Schaffner, the supervisor of customer service, noted that, although appellant may have completed a W-4 form, no taxes were taken out of his pay. Appellant had no set payday and tracked his hours on a PS Form 1234C. Mr. Schaffner explained that, when appellant wanted to be paid, whether after two weeks or one week or just when he needed money, he would submit a PS Form 1234C for payment. Appellant would be issued a postal money order for the full amount of his hours worked times the hourly rate to which he agreed. Mr. Schaffner noted that the PS Form 7355 cleaning agreement provided in Item #1: "The supplier will be paid in cash, check or no fee money order, the [employing establishment] will not withhold taxes or take any other kind of deduction from these payments." Mr. Schaffner indicated that appellant filed a claim with the Internal Revenue Service (IRS) concerning his independent contractor status and the IRS ruled that he was an independent contractor. The employing establishment contended that appellant was hired as an independent contractor, that he was mistakenly given a W-4 form; however, he was advised it would not be processed because he was a contractor. The employing establishment further noted that appellant was selected to provide contract cleaning because he had a local carpet cleaning service and he was allowed to come to work and provide services anytime during the hours of operation.

Appellant responded by letter dated December 7, 2001. He contended that the contract he signed was subject to the Contract Dispute Act of 1978; that the W-4 form was not given to him by mistake; that it was irrelevant that he had a carpet cleaning business; that the employing establishment was misleading when they said he could do things on his own time, hours and using his own tools and that the IRS did not make any decision. Appellant indicated that he was providing copies of his time clock dates and that he was paid an hourly wage every two weeks. He advised that he was asked to move heavy material, which was not part of his cleaning agreement, and come in early in the morning and stay late.

By decision dated January 14, 2002, the Office denied modification of the September 7, 2001 decision.

By letter dated January 24, 2002, appellant requested reconsideration. He reiterated that he was not a contract worker, although the signed contract agreement was critical evidence against him. Appellant repeated his arguments that his injury occurred outside of the contract work, and was because he was "doing another job unrelated to my contract." Appellant alleged that although this work was not contract related, it was carried out at the employing establishment on an hourly basis directed by the postmaster and was performed with a coworker, Don Chamberlain.

In a decision dated April 11, 2002, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was cumulative in nature and insufficient to warrant review of the prior decision.

By letter dated August 30, 2002, appellant, through his representative, requested reconsideration and submitted additional evidence.

In a statement dated August 7, 2002, Mr. Chamberlain indicated that appellant took over his job as custodian and janitor. Appellant was hired on an hourly basis and the postmaster set the hours and hourly wage for him and then for appellant. At times, the postmaster requested that tasks be completed that were not part of the custodial work, or asked for assistance with noncustodial work, including moving postal units into the postmaster's truck and delivering them to a storage area or moving heavy key boxes from one set of file shelves to another. Mr. Chamberlain explained that this was due to new construction and renovation taking place at the post office. He added that both he and appellant strained tremendously lifting these units and recalled appellant complaining about pain in his wrists. Mr. Chamberlain added that they were given instructions from the postmaster as to where to move the boxes, and this type of work was unrelated to custodial work because it was a one time request related to the renovation.

In an August 9, 2002 statement, Susan Webb, a former employee, indicated that the postmaster cut the budget by replacing the part-time maintenance person with a contractual maintenance person who punched a time clock and was paid an hourly rate. She also indicated the times of day varied depending upon when the maintenance person was needed or wanted to come in. Usually there was a routing of what the maintenance person needed to accomplish on a daily basis and sometimes the postmaster would ask that special jobs or extra jobs be done by appellant and Mr. Chamberlain, who worked on a contractual basis. It was her understanding that they provided their own insurance. Ms. Webb noted that two years ago, they opened a new

employing establishment and both appellant and Mr. Chamberlain were asked to help move carrier cases to the new location and they did not have proper equipment. She added that a new contract person was hired and he was not asked to deviate from his duties.

Appellant provided a statement addressing his hourly wage, hours worked per week, times, duties. Approximately one month after starting work, his wrists began to bother him and he received a weight restriction for lifting. He indicated that, on occasion, he would be asked to do work outside his duties and restrictions, including moving heavy items, planting flowers or posting monthly performance calendars using a ladder. The employing establishment provided cleaning materials, mops, brooms and he was responsible for ordering supplies which the employing establishment approved. Appellant indicated that he was paid twice a month, he had to clock in and out each day and turn in his time card to be paid via postal money order.

In a report dated August 15, 2002, Dr. Russell A. Parker, an osteopath, indicated that appellant had a six-year history of wrist pain and arthritis. Dr. Parker noted that, on December 26, 1999, appellant had a motor vehicle accident, where he was rear-ended. He indicated that, at the time, appellant was holding onto the steering wheel, which led to a dramatic increase in left thumb and right wrist pain. Dr. Parker noted that, after treatment, appellant went to work for the post office in February 2000, with restrictions of 5 pounds for the right upper extremity and 15 pounds for the left upper extremity. He indicated that, in September 2000, appellant was asked to move heavy equipment due to remodeling at the facility and noticed increased wrist pain. Dr. Parker diagnosed a wrist injury, but the exact diagnosis was unsure. He opined that appellant had a long-term exacerbation of his preexisting injuries and was going to need extensive physical therapy.

In a November 4, 2002 letter, Jim Damm, a human resources specialist from the employing establishment, indicated that appellant worked only 18 hours a week; that janitorial supplies were not valuable equipment; either party could terminate the contract at any time for any or no reason with one day' notice; and that appellant's duties specifically related to cleaning. The employing establishment indicated that he received no training.

In a December 31, 2002 decision, the Office denied modification of the prior decisions.

The Board finds that appellant is not an "employee" of the United States pursuant to 5 U.S.C. § 8101(1)(A).

A claimant of benefits under the Act has the burden to establish all the necessary elements of his claim, including that he, or the decedent, if applicable, at the time of the injury, or death, was a civil employee of the United States.[2] For purposes of determining entitlement to compensation benefits under the Act, an "employee" is defined, in relevant part, as a "civil officer or employee in any branch of the Government of the United States, including an officer or an employee of an instrumentality wholly owned by the United States."[3]

[2] *See e.g. Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[3] 5 U.S.C. § 8101(1)(A).

In the case of *Carl R. Clover*,[4] the Board stated:

> "With regard to whether a claimant is a federal employee for purposes of the [Federal Employees' Compensation] Act, the Board has noted that such a determination must be made considering the particular facts and circumstances surrounding his or her employment. The question of whether a person is an employee of the United States or of an independent contractor is ultimately a question of fact to be decided on an individual basis in the particular case. Included among the many factors to be considered in resolving the issue are the right of control of work activities, the right to hire and fire, the nature of the work performed, the method of payment for the work, the length of time of the job and the intention of the parties. With regard to the method of payment for the work, including the identity of the party who paid the wages, the implication that a claimant was a federal employee cannot be drawn solely from the fact that his or her salary was derived from a fund to which the federal government contributed.[5] (Citations omitted.)

The Board has recognized that the right to control work activities is an important factor in determining an employer relationship.[6]

The Board notes that appellant was in control of his work time and the method in which he performed his duties as he was free to perform the cleaning services anytime the employing establishment was open and that he was free to hire helpers at his own discretion. He was also free to perform any other services or do whatever else he wished outside the 18 hours per week of janitorial services. With respect to direct evidence of control, the record supports that the employing establishment did exercise some control over appellant as appellant was occasionally requested to perform work outside the scope of his cleaning agreement. For example, Mr. Chamberlain confirmed that he and appellant were once requested to assist with moving items when the employing establishment moved due to a renovation. Ms. Webb also confirmed that appellant assisted when they moved to a new location and occasionally performed special jobs for the postmaster. However, the performance of occasional extra duties does not establish an employer-employee relationship.

Regarding the method of payment, the record reflects that, although appellant alleged that he signed a time clock and was paid every two weeks, no deduction was made from appellant's pay check for sick leave, annual leave or taxes. Appellant was responsible for his own insurance and for the hours he worked. The employing establishment indicated that appellant was paid in

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[4] 41 ECAB 625 (1990); *order granting petition for recon. and granting clarification*, Docket No. 90-309 (issued March 7, 1991).

[5] *Id.* at 632.

[6] *See Kasanee Sawyer (Wallace B. Sawyer, Jr.)*, 40 ECAB 1332 (1989); *see also* Larson, *The Law of Workers' Compensation*, which notes that the principle factors showing right of control are: "(1) direct evidence of right or exercise of control; (2) method of payment; (3) the furnishing of equipment; and (4) the right to fire." Larson, *The Law of Workers' Compensation*, §§ 44.00.

the form of cash, check or no fee money order, whenever he filled out the appropriate postal form. With regard to the method of payment for the work, including the identity of the party who paid the wages, the implication that a claimant was a federal employee cannot be derived solely from the fact that his or her salary was derived from a fund, to which the federal government contributed.[7]

With regard to the furnishing of equipment, there is evidence in the agreement that the employing establishment was to provide reasonable quantities of cleaning equipment and supplies. However, appellant agreed to provide cleaning services of the kind and quality offered in the commercial market place under commercial terms and conditions and the employing establishment reserved the right to reject unsatisfactory work.

Regarding the right to hire and fire, the contract specified that the employing establishment or the supplier could terminate the contract for any reason with one day's notice. Since either party was free to terminate the contract for any reason, this supports that appellant was an independent contractor as he was in control of his activities and free to engage the services of assistants or helpers, or to decline to continue providing services to the employing establishment upon one day' notice and able to make agreements to provide cleaning services for other businesses.

Regarding the above referenced factors, the intent of the parties is clear. Appellant entered into a February 15, 2000 agreement with the employing establishment to provide janitorial services for 18 hours a week. The contract specified that appellant was an independent contractor and was not to be construed as a federal employee. The contract specified that by signing the form, appellant agreed that he was not a postal employee and he was performing the services as an independent contractor. Appellant's signature is on the contract and appellant does not dispute that he signed the contract. The record reflects that when he was inadvertently given a W-4 form, it was not processed, he was given the proper form relating to independent contractors and appellant signed the form acknowledging such.

Applying the traditional right of control analysis to the facts of this case, the Board does not find evidence that the employing establishment exercised such control over the work that an employer-employee relationship was created at the time of appellant's injury.

In addition to the right to control factors, the Board has looked to the nature of the work performed in determining whether a worker is an employee or an independent contractor. The Board has noted that the modern tendency is to find employment when the work being done is an integral part of the regular business of the employer and when the worker, relative to the employer, does not furnish an independent business or professional service.[8]

Applying this test to the present facts establishes that appellant was not an employee in this case. The nature of work specified in the contract and by appellant was for janitorial services. Appellant had a local cleaning business and was in the business of providing

[7] *Funnia F. Hightower*, 28 ECAB 83 (1976).

[8] *Donald L. Dayment*, 54 ECAB __ (Docket No. 01-1846, issued January 21, 2003).

commercial cleaning services to the employing establishment and other private entities in the community. The employing establishment was in the business of delivering mail. Neither party disputed that the services were rendered; however, appellant asserts that he did work outside the scope of his agreement. The contract specified that appellant was to provide cleaning services and there is no indication in the record that he was bound to perform any other service. The evidence supports that he ran a cleaning business and was free to perform cleaning services for other entities. Although there is support from Mr. Chamberlain and Ms. Webb that appellant helped move heavy boxes related to an employing establishment renovation and occasional odd jobs outside of his contract, this alone does not make him an employee. The agreement that appellant entered into does not specify that he was required to provide other than custodial services and he was free to decide whether he chose to assist with the noncustodial matters. With respect to work performed outside the scope of his agreement, this is not the sole factor in determining whether he was an employee or an independent contractor. In ascertaining whether an individual is an employee of another, each case must be decided on its own facts and ordinarily no single feature of the relationship is determinative.[9] The Board finds the "nature of the work" performed establishes that appellant was an independent contractor hired to perform a professional service.

Regarding the length of time on the job, the contract indicates that the agreement commenced on February 15, 2000 and the employing establishment terminated the contract on October 15, 2000. The contract specified the terms under which the parties could terminate the contractual services.

The Board therefore finds that, under the "control" and "nature of the work" tests, appellant was not an employee of the employing establishment. The Board finds that he was performing work as an independent contractor, not as an employee of the United States under 5 U.S.C. § 8101(1)(A), and he is not entitled to compensation benefits under the Federal Employees' Compensation Act.

[9] *Pearl Phillips Parker*, 9 ECAB 200, 205 (1956).

The December 31 and April 11, 2002 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
August 14, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member